Petition

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No. 81-1365

In the Supreme Court of the United States

October Term, 1981

DAVID MICHAEL BRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

What constitutes a "claim" under 28 U.S.C. §2675 of the Federal Tort Claims Act sufficient to confer jurisdiction on a District Court in the event of the claim's denial? The Fifth Circuit has held a "claim" need not include information required by 28 C.F.R. §14.4, a regulation intended to facilitate the administrative settlement of claims. (See *Adams v. United States* (5th Cir. 1980) 615 F.2d 284, rehrg. denied, 622 F.2d 197.) In the present case, the Ninth Circuit has expressly rejected the Fifth Circuit's rule and held that a sufficient "claim" must include compliance with any burdensome requests for documentation under 28 C.F.R. §14.4.

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

INTRODUCTION

This petition seeks resolution of a conflict among the Courts of Appeals concerning the definition of a "claim" under the Federal Tort Claims Act (FTCA).

Petitioner David Michael Bright became a paraplegic following a skin diving mishap because a doctor at a Navy hospital negligently failed to diagnose his condition as the "bends." Petitioner filed a claim which met the requirements of 28 C.F.R. §14.2(a), defining "claim." Thereafter, the Navy made numerous demands for further documentation pursuant to another regulation, 28 C.F.R. §14.4(b). The latter regulation, in the hope of facilitating settlement of claims, permits the government to obtain full discovery of a claimant's case without providing any discovery in return.

Eventually, petitioner declined to provide additional documentation. He stated he wished to have his claim denied so he could file suit in the District Court where he could obtain the discovery he needed before the evidence became stale. The Navy then denied the claim citing noncompliance with §14.4(b). Petitioner's subsequent lawsuit was dismissed for lack of jurisdiction on the ground his claim had not met the regulatory requirements.

The judgment here is an example of the shamefully unjust results which can flow from misapplication of burdensome governmental regulations: a citizen's legitimate claim against the government, based on the government's own negligence, has been defeated by a regulation put to a use which was never intended.

On appeal, the Ninth Circuit affirmed the judgment of dismissal, acknowledging its decision squarely conflicts with the rule of the Fifth Circuit that the same burdensome regulation cannot be used to defeat a lawsuit under the FTCA where, as here, the administrative claim is in proper form. (See *Adams v. United States* (5th Cir. 1980) 615 F.2d 284, reh. denied, 622 F.2d 197.)

Petitioner respectfully requests that a writ of certiorari issue in this case to resolve the above conflict among the

Courts of Appeals and to reaffirm the right of citizens to litigate their claims against the government without being subject to blindly enforced administrative regulations which generally serve no purpose except to delay a just resolution of claims.

QUESTIONS PRESENTED

What constitutes a "claim" under 28 U.S.C. §2675 of the Federal Tort Claims Act sufficient to confer jurisdiction on a District Court in the event of the claim's denial? The Fifth Circuit has held a "claim" need not include information required by 28 C.F.R. §14.4, a regulation intended to facilitate the administrative settlement of claims. (See *Adams v. United States, supra*, 615 F.2d 284, rehrg. denied, 622 F.2d 197.) In the present case, the Ninth Circuit has expressly rejected the Fifth Circuit's rule and held that a sufficient "claim" must include compliance with any burdensome requests for documentation under 28 C.F.R. §14.4.

PARTIES TO THE PROCEEDING

The parties to this proceeding are stated in the caption. Petitioner is David Michael Bright, plaintiff and appellant below. Respondent is the United States of America, defendant and appellee below.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, to which this petition is directed, was filed October 15, 1981, and is set forth in Appendix A. The opinion affirms a judgment of the United States District Court for the Central District of California. Set forth in Appendices B and C, respectively, are the judgment of the District Court and its memorandum opinion.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the October 15, 1981 opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) affirming the judgment of dismissal of his claim under the Federal Tort Claims Act. Jurisdiction is conferred upon this Honorable Court pursuant to 28 U.S.C. §1254, subd. (1).

STATUTES AND REGULATIONS INVOLVED IN THIS PROCEEDING

The primary statute and regulations involved in the present proceeding are, respectively, 28 U.S.C. §2675 and 28 C.F.R. §§14.2, 14.4(b).

28 U.S.C. §2675 provides in pertinent part as follows:

> "(a) An action shall not be instituted upon a claim against the United States for money damages for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency . . . ."

28 C.F.R. §14.2 provides in pertinent part as follows:

> "(a) . . . a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for . . . personal injury . . . alleged to have occurred by reason of the incident. . . ."

The full text of §2675, along with the full texts of 28 C.F.R. § § 14.2 and 14.4(b) are set forth in Appendix D.

STATEMENT OF THE CASE

A. The Accident.

On December 9, 1975, petitioner David Michael Bright made a scuba dive of 165 feet off the Southern California coast. Approximately 10 minutes after surfacing he began to experience generalized abdominal cramps, followed by numbness in his legs. Within 90 minutes after surfacing he experienced marked muscle weakness in his legs. [E.R. 2-4, 87, 287-289.][1]

Bright's friends and co-divers evacuated him to the Port Hueneme Naval Hospital where he was seen on an emergency basis by a Navy doctor. Although the Port Hueneme facility apparently had a decompression chamber used for treatment of decompression illness ("bends"), the Navy doctor declined to allow such treatment, having concluded that Bright was not suffering from the "bends". The doctor released Bright from the hospital. Bright was then taken by his friends to St. John's Hospital in Santa Monica, approximately 50 miles away, where he was correctly diagnosed as suffering from the "bends." He was flown to a decompression chamber on Catalina Island, the nearest one to that hospital. Over six hours elapsed between the time Bright surfaced from his dive and the time decompression therapy began. The treatment came too late. As a result, Bright now suffers from paralysis in each of his legs and difficulty in emptying his bladder. [E.R. 2-4, 27, 287-289.]

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[1] "E.R." refers to the Excerpt of Record. "R.T." refers to the Reporter's Transcript.

Despite extensive physical therapy, Bright remains unable to walk except with the assistance of hand crutches. He cannot walk in the dark and is not aware of the placement of his lower extremities. He requires continuous physical therapy, catheterization and bowel assistance. His present prognosis is 80 percent permanent disability. [E.R. 84-222, 225-284, 287-289.]

B. The Administrative Claim.

On March 3, 1977, acting through his attorney, Bright filled out a Standard Form 95 Claim for Damage or Injury which was received by the claims office of the Navy on March 7, 1977. [E.R. 27.]

By letter dated March 15, 1977, a Lt. H. D. Henderson, United States Naval Reserve, Naval Support Authority, Long Beach, California, requested that Bright execute a Privacy Act Statement and forward additional documentation to him. [E.R. 25.]

One of Bright's attorneys then had a telephone conversation with Lt. Henderson who advised that the medical records then in Bright's possession should be forwarded to the Navy, pursuant to 28 C.F.R. § 14.4(b), and that those records would be sufficient for evaluation of Bright's claim. [E.R. 38-39.]

Bright refiled the Standard Form 95, along with all the medical records available, on August 30, 1977. Bright's attorney advised the claims office of the Naval Support Authority by letter of the same date that all available medical records had been submitted. [E.R. 26-27, 39-40, 50.]

On October 5, 1977, having received no response, Bright's attorney wrote to the claims office requesting the status of the claim. [E.R. 51.] On October 20, 1977, Bright's attorney again requested by letter the status of the claim, still having received no response. [E.R. 52.]

By a letter dated October 20, 1977 and received by Bright's attorney on October 25, 1977, Lt. Henderson advised Bright his claim had been transferred to the Naval Legal Service Office in San Diego. [E.R. 53.] On October 27, 1977, R. A. Smith, Chief of the Claims Division, Department of the Navy, Naval Legal Services Office, San Diego, California, returned the Standard Form 95 because it did "not constitute a proper claim as it must contain a total in a stated sum certain in order to be considered as such."[2] Smith's letter also requested, pursuant to 28 C.F.R. §14.4(b), further medical records and information regarding Bright's loss of time from work and loss of wages. The letter also advised that Bright should be prepared to submit to a physical examination by a doctor employed by the Navy or by another federal agency, as permitted by §14.4(b) (1). [E.R. 28-29, 54-55.]

On November 23, 1977, Bright's attorney resubmitted the Standard form 95 with the $5,000,000 figure repeated on the line designated "Total," and initialed by Bright. In an accompanying letter, Bright's attorney advised the Navy that Bright had been rendered a complete and total paraplegic as a result of the injuries he suffered on December 9, 1975 and that Bright had been receiving

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[2]The Standard Form 95 form submitted on August 30, 1977 indicated the claim was for five million dollars, consisting only of personal injuries, as follows:

	"Amount of Claim
"Property Damage	$N/A
"Personal Injury	$5,000,000.00
"Total	$ " [E.R. 27.]

Smith's assertion that the form was not proper was based on petitioner's failure to repeat the $5,000,000.00 figure on the line adjacent to "Total."

extensive medical assistance since the accident. Bright's attorney further advised that Bright had been the owner of a scuba diving shop at the time of the accident and that his loss of earnings was substantial. Counsel noted the claim would surely be denied at some future date and requested a prompt denial in order that Bright could file an action in federal court and begun taking discovery. Finally, counsel indicated that if he did not receive a response from the Navy within 15 days, he would assume the Navy had chosen to deny the claim and he would commence litigation. [E.R. 30-31, 34-35, 56-57.]

Bright's counsel heard nothing from the Navy until January 26, 1978, when a Lt. Joseph Wassell, of the Port Hueneme Naval Hospital telephoned him. Lt. Wassell indicated the matter had recently been assigned to him to conduct an "informal investigation." Bright's attorney indicated to Lt. Wassell that Bright had been rendered a total paraplegic as a result of the December 9, 1975 accident, that his health was deteriorating, and that he was badly in need of benefits. Lt. Wassel indicated that before he could return the file to San Diego he needed a statement from Bright and the two witnesses whose names appeared on the Standard Form 95. Bright's attorney advised that Bright would be available for taking a statement and for a physical examination when the matter was before the District Court. Counsel requested that Lt. Wassell grant permission for an informal statement to be taken from Navy doctor who had examined Bright on the date of the accident. Lt. Wassell indicated he did not have the authority to do this. [E.R. 42-43.] On January 30, 1978, Bright's attorney sent a letter to Lt. Wassell confirming their January 26, 1978 telephone conversation. [E.R. 7-8, 58-59.]

Neither Bright nor his attorney heard anything further from the Navy until April 11, 1978. On the latter date, C.

B. Smiley, Jr., Acting Deputy Assistant, Judge Advocate General, Department of the Navy, Washington, D.C., wrote to Bright's attorney stating, "The case has been referred for evaluation by our legal medical experts. Following the review by these experts, you will be contacted." Then, inconsistently, the letter also claimed that Bright had failed to act in good faith in documenting his claim, that no administrative adjudication of the claim was possible, and that the claim was therefore deemed denied as not properly perfected. Finally, the letter advised that the statute of limitations for filing a proper claim had expired several months earlier on December 9, 1977. [E.R. 32-33, 44, 60-61.]

C. The Action In The District Court Under The Federal Tort Claims Act.

On August 11, 1978, Bright filed suit against the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671, et seq.[3]

The government filed a motion for dismissal or in the alternative for summary judgment on the ground the District Court lacked jurisdiction over the subject matter because Bright had failed to file a proper administrative claim as required by 28 U.S.C. §2675(a). [E.R. 7-36.] The District Court granted the motion to dismiss for lack of jurisdiction on the ground that petitioner had not properly complied with the administrative claim procedures. [E.R. 292-294, 295; Appendices B and C.]

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[3]The complaint also listed Bright's wife as a plaintiff and listed the United States Navy, Port Hueneme Naval Facility, and the Navy doctor who had treated Bright as defendants. The District Court later issued its order dismissing the complaint as to Mrs. Bright and as to the defendants other than the United States. The dismissal was with petitioner's consent and no issue regarding it was raised on this appeal. [E.R. 63-64, 81.]

On appeal, the judgment of dismissal was affirmed. [Appendix A.] The Court of Appeals held as follows:

1. The Navy's seriatim requests for further documentation were "reasonable." [See Appendix A, p. 21.]

2. Failure to submit documentation requested under 28 C.F.R. §14.4(b) bars an action in the District Court under the FTCA even where, as here, a proper Standard Form 95 had been submitted pursuant to 28 C.F.R. §14.2(a). [See Appendix A, p. 22.]

3. "We have considered the recent decision of the Fifth Circuit in *Adams v. United States,* 615 F.2d 284, *reh. denied,* 622 F.2d 197 (1980) [holding that §14.4 does not bar District Court jurisdiction where a proper Standard Form 95 is filed]. We are, of course, bound by our prior precedents." [See Appendix A, p. 22.]

This petition followed.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the District Court was 28 U.S.C. §2675. As noted above, the District Court entered judgment dismissing petitioner's action on the ground that jurisdiction was lacking due to petitioner's failure to present a sufficient "claim" within the meaning of §2675.

ARGUMENT

WHERE A CLAIMANT HAS FILED A CLAIM UNDER THE FEDERAL TORT CLAIMS ACT ON THE PROPER GOVERNMENT FORM, PROVIDING ALL INFORMATION SOUGHT BY THAT FORM, HE OR SHE HAS ESTABLISHED A BASIS FOR JURISDICTION OF A LAWSUIT IN THE DISTRICT COURT IN THE EVENT OF THE CLAIM'S DENIAL. FAILURE OF THE CLAIMANT TO SUPPLY ALL ADDITIONAL INFORMATION SOUGHT BY THE GOVERNMENT PURSUANT TO REGULATIONS INTENDED TO MAKE SETTLEMENT OF CLAIMS POSSIBLE DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO ADJUDICATE A LAWSUIT FILED AFTER DENIAL OF THE CLAIM.

A. Summary Of The Statutory And Regulatory Scheme.

The Federal Tort Claims Act (FTCA), originally enacted in 1946, was substantially amended in 1966. (Pub.L. 89-506.) The Committee on the Judiciary of the House of Representatives described the 1966 amendments as having "the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." (See Sen. Report No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News, pp. 2515-2516.)

28 U.S.C. §2675(a), as amended in 1966, provides that a claimant under the FTCA may not institute an action against the government in a District Court unless he or she "shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied . . . ."

The critical regulation adopted in conformance with the above statute is 28 C.F.R. §14.2(a) which defines presentation of a claim as follows:

> ". . . a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for . . . personal injury . . . alleged to have occured by reason of the incident . . . ."

There is no dispute in the present case that petitioner's Standard Form 95, as modified at the Navy's request, met the above requirements of §2675(a). Accordingly, it would seem that following denial of the claim the District Court had jurisdiction to adjudicate petitioner's lawsuit based upon the same claim. In fact, had the present case arisen in the Fifth Circuit, as discussed below, that would have been the result. However, this case arose in the Ninth Circuit where a different rule is followed. That rule finds a claim insufficient to confer jurisdiction upon a District Court where the claimant does not also comply with all requests by an agency for further information pursuant to 28 C.F.R. §14.4.

28 C.F.R. §14.4(b) provides that a personal injury claimant may be required to submit a detailed written report from his attending physician concerning his injury and its treatment, the degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In connection with such a report, the claimant may be required to submit to a physical examination by a government doctor. In addition, the claimant may be required to submit itemized bills for medical and hospital expenses, a statement of expected future medical expenses, a written statement from his employer showing time and wages lost from employment, documentary evidence showing loss of other income and

"Any other evidence or information which may have a bearing on" the claim. In short, §14.4(b) allows the government to obtain full discovery from a claimant at a time when the claimant has no legal means by which he may obtain any sort of discovery from the government.

The question thus presented by this petition is whether District Court jurisdiction to entertain an FTCA lawsuit can be predicated on the submission of all documentation and other information sought under §14.4(b). That is, may District Court jurisdiction be precluded despite a claim's compliance with §14.2(a), defining presentation of a claim, in order to permit the government to obtain full discovery at the administrative level where the claimant does not wish to settle and where, as here, the government undoubtedly will deny the claim in any event.

B. The Fifth Circuit Rule Correctly Refuses To Predicate District Court Jurisdiction Upon A Claimant's Compliance With Information Demands Under §14.4(b).

In *Adams v. United States, supra,* 615 F.2d 284,[4] the Court of Appeals for the Fifth Circuit held that a claimant under the FTCA satisfies the requirement of presenting his claim to the appropriate agency when he "(1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim." (615 F.2d at 289.) The Fifth Circuit stated:

> "This information alone allows the claimant to maintain a subsequent action in the district court following the denial of his or her claim by the agency . . . ." (615 F.2d 289-290.)

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[4] The *Adams* decision was filed too late for discussion in the briefs in the present appeal. However, *Adams* was discussed at oral argument.

In *Adams*, the claimants failed to provide all the information requested by the Air Force concerning a claim based upon medical malpractice. The District Court dismissed their lawsuit because of the latter failure. On appeal the Fifth Circuit reversed, holding that the plaintiffs' claim was sufficient within the meaning of 28 U.S.C. §2675(a) since it gave the Air Force sufficient notice of the nature of the claim to enable the Air Force to investigate and since it placed a value on the claim. (615 F.2d 289-290.)

In reaching the above result, the Fifth Circuit distinguished between a "claim" pursuant to §2675 and submission of additional information pursuant to 28 C.F.R. §14.4. Based upon an exhaustive study of the legislative history of the FTCA and its attendant regulations, the Court found that jurisdiction to file a District Court lawsuit depends only upon sufficient "notice" pursuant to §2675. In contrast, the Court found that 28 C.F.R. §14.4 and similar regulations were merely intended to facilitate out of court settlement of claims, as allowed by 28 U.S.C. §2672, if both parties are desirous of seeking such a settlement. The court stated the latter conclusion as follows:

> "Section 2672 governs agency conduct, including administrative settlement and adjustment of properly presented claims, once notice has been given pursuant to section 2675. [Citation.] It facilitates settlement by authorizing the Department of Justice to promulgate regulations defining the settlement process for administrative claims . . . . Thus, section 2672 creates a structure within which negotiations may occur. Noncompliance with section 2672 deprives a claimant only of the opportunity to settle his or her claim outside the courts.

"The requirements of section 2675 and of section 2672 are, therefore, independent. Presentation of a claim and its settlement are distinct processes . . . .

"A claimant will ordinarily comply with 28 C.F.R. §§14.1-14.11 if he or she wishes to settle his or her claim with the appropriate agencies. These requirements go far beyond the notice requirement of secton 2675. Equating these two very different sets of requirements leads to the erroneous conclusion that claimants *must* settle with the relevant federal agency, if the agency so desires, and *must* provide that agency with any and all information requested in order to preserve their right to sue. This conclusion is not supported by relevant legislative history.

". . . .

"A claimant's refusal to settle his or her claim will not deprive the federal court of jurisdiction, if the claimant has provided the statutorily required notice. Although many claimants will rationally elect to settle their claims, Congress clearly did not deem settlement mandatory." (615 F.2d at 290-291; emphasis in original; footnotes omitted.)

If applied to the present case, the above holding in *Adams* would compel reversal of the judgment dismissing petitioner Bright's complaint. This result is reinforced by the logic of the Court's conclusion in *Adams*:

"A federal court's power to adjudicate a tort claim brought against the United States depends solely on whether the claimant has previously complied with the minimal requirements of the

> statute. 28 U.S.C. §2675. Federal court power does not depend on whether a claimant has successfully navigated his or her way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both." (615 F.2d at 292.)[5]

The rule established by the Fifth Circuit in *Adams* has been followed by that same circuit in *Crow v. United States* (5th Cir. 1980) 631 F.2d 28, 30, as well as by several district courts. (See *Spear v. United States* (N.D. Tex. 1981) 512 F.Supp. 670, 674; *Hoaglan v. United States* (N.D. Iowa 1981) 510 F.Supp. 1058, 1061.)[6]

In summary, if the rule of the Fifth Circuit is applied to the present case, the judgment of dismissal of petitioner's lawsuits would be reversed.

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[5]On denial of rehearing, the Fifth Circuit further explained its holding in *Adams*: "The present appeal does not present a case in which the notice of claim presented by the claimant in an executed standard form 95 was inadequate in content or detail. . . . We have not, however, intimated an opinion as to the effect, if any, a claimant's refusal to comply with an agency's reasonable request for supplemental information to clarify an inadequate claim would have on the issue of jurisdiction in a subsequent action for damages brought pursuant to the Federal Tort Claims Act." (622 F.2d at 197.)

As noted previously, there is no question in the present case that petitioner Bright's Standard Form 95 was adequate.

[6]The *Adams* opinion discusses the conflicting rules among the Circuits on issues similar to that presented by the present case. (See 615 F.2d at 291, fn. 15.)

C. The Ninth Circuit Rule, As Stated In The Present Case, Is In Square Conflict With The Fifth Circuit's Rule.

The Ninth Circuit's opinion in the present case rejected the Fifth Circuit's rule as follows:

> "We have considered the recent decision of the Fifth Circuit in *Adams v. United States,* 615 F.2d 284, reh. denied, 622 F.2d 197 (1980). We are, of course, bound by our prior precedents." (See Appendix A, p. 22.)

The above statement apparently referred to the following discussion in the Court's opinion:

> "In *House v. Mine Safety Applicance Co.,* 573 F.2d 609, 613-614 (9th Cir. 1978), we stated that the administrative claim requirement is jurisdictional. It cannot be waived. In *House,* we held 28 CFR § 14.2 to be properly within the power of the agency to adopt. We see no reason on this record to adopt a different conclusion with regard to 28 CFR § 14.4(b). *See also, Avril v. United States,* 461 F.2d 1090 (9th Cir. 1972), and *Caidin v. United States,* 564 F.2d 285 (9th Cir. 1977)." (Appendix A, p. 22.)

None of the cases cited in the above quotation involved a claimant's failure to comply with requests for information made pursuant to § 14.4. Accordingly, the Ninth Circuit's own precedents did not establish a rule squarely in conflict with the Fifth Circuit's rule. However, such a conflict has now been firmly established by the result in the present case. Issuance of a writ of certiorari and resolution of the conflict, with its far-reaching implications, is therefore necessary and appropriate.

D. The Fifth Circuit's Rule Is Preferable To The Ninth Circuit's.

Petitioner submits that the Fifth Circuit's rule which refuses to predicate federal court jurisdiction over FTCA actions upon compliance with burdensome regulations such as § 14.4(b) is far preferable to the rule announced by the Ninth Circuit. The reasons for the Fifth Circuit's rule are set forth in the *Adams* opinion (615 F.2d at 288-292) and include the following:

1. The language of the critical statute, 28 U.S.C. §2675(a), clearly suggests that jurisdiction to file a federal court lawsuit is predicated only upon prior notice to the government by means of a Standard Form 95 claim and denial of that claim. (See 615 F.2d at 289-290.)

2. The legislative history of the FTCA requires the same interpretation. (See 615 F.2d at 290-291, and particularly fn. 11.)

3. The purpose of 28 C.F.R. § 14.4 is not related to district court jurisdiction. Rather it is to permit the government to enter into reasonable settlements of claims pursuant to 28 U.S.C. § 2672 where both parties, including the claimant, are amenable to settling prior to a lawsuit. (See 615 F.2d at 290, fn. 11.)

4. Medical malpractice claims, such as that in *Adams* and in the present case, are less amenable to settlement at an early stage and agencies "were not intended to bar cases involving difficult issues from federal court by turning their difficulty against the claimants." (615 F.2d at 291.)

5. Federal court jurisdiction should not depend upon "the vagaries of [requests by] the claims agent [which] may touch picayune details, imponderable matters, or both." (615 F.2d at 292.)

In short, the Fifth Circuit's rule recognizes that, as here, burdensome regulations may be turned against deserving claimants, causing delays and indeed complete roadblocks on the path to a fair adjudication in court. Nothing in the history of the FTCA nor in our concepts of due process should permit complex and burdensome regulations, such as §14.4(b), to be used by government functionaries for any unintended purpose, and particularly one which results in denial of an opportunity for a claimant to litigate in our federal courts.

The Ninth Circuit has not articulated any reason for its rule which predicates federal court jurisdiction on compliance with demands under §14.4(b). However, the reason which would be asserted is rather obvious: compliance with §14.4(b) and similar regulations may lead to settlements which will ease congestion in the district courts.

Nonetheless, upon comparison with the reasons supporting the Fifth Circuit's rule, the latter justification is insufficient. The fact is that substantial claims such as petitioner's are rarely if ever settled prior to a lawsuit. Even assuming a claimant might be willing to settle, the government ordinarily denies such claims without even a token settlement offer.

The real effect of the Ninth Circuit's rule is not to encourage settlements but, rather, to provide the government with full discovery of a claimant's case, at the claimant's expense, while simultaneously delaying the ultimate adjudication of the claim. (See *Adams v. United States, supra,* 615 F.2d 284, 290, fn. 9.) This result is flatly inconsistent with the 1966 amendments to the

FTCA which had "the common purpose of providing for more fair and equitable treatment of . . . claimants when they deal with the Government. . . ." (See Sen. Report No. 1327, *supra*, at pp. 2515-2516.)

Thus, petitioner submits the rationale of the Fifth Circuit's rule is superior to that of the Ninth Circuit's rule. Accordingly, upon issuance of a writ of certiorari, this Honorable Court should adopt for all future cases the better rule as followed by the Fifth Circuit.

CONCLUSION

The Ninth Circuit's rule, adopted in the present case, permits agencies to impose an extremely unfair burden on claimants, with noncompliance leading to denial of access to our federal courts. The regulation upon which the Ninth Circuit has relied was never intended to have this effect. Instead, as the Fifth Circuit has wisely held, federal court jurisdiction over FTCA actions is predicated only upon prior presentation and denial of a claim conforming with Standard Form 95, such as that presented by petitioner here.

Accordingly, petitioner respectfully requests that this petition for a writ of certiorari be granted and that the judgment against petitioner be reversed.

Respectfully submitted,

LAW OFFICES OF FRED G. GLANTZ
EDWARD J. HOROWITZ,
A Professional Corporation,

By EDWARD J. HOROWITZ
Attorneys for Petitioner
David Michael Bright

Appendix

APPENDIX A

FILED

OCT 15 1981

CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MICHAEL BRIGHT, Plaintiff-Appellant, vs. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 79-3521 D.C. No. CV 78-3110-RF(KX) MEMORANDUM

Appeal from the United States District Court
for the Central District of California
The Honorable Robert Firth, Presiding
Argued and submitted April 6, 1981

Before: ANDERSON and NELSON, Circuit Judges, and MURPHY,* District Judge.

Appellant (Bright) in this Federal Tort Claims Act case alleged the failure of a Navy doctor to diagnose and treat decompression symptoms after a deep sea dive. His complaint was dismissed for lack of jurisdiction based on the Navy's position that Bright, through his attorney, had filed an insufficient claim.

We do not set forth the sequence of events. The pertinent events are well reflected in the record and are known to the parties. It is sufficient to say that Bright's attorney does not, and on this record could not, claim ignorance of the specific requirements of the regulations and the specific notices and requests of the Navy. Counsel for Bright adopted an obstinate attitude in the face of the reasonable requests.

The district court held that the failure to provide medical, employment, expense, and witness information in support of his claim as provided in the regulations adopted

*The Honorable Thomas F. Murphy, Senior United States District Judge, Southern District of New York, sitting by designation.

pursuant to the Federal Tort Claims Act barred Bright's action in the district court. We agree and affirm.

The district court's Memorandum of opinion filed July 24, 1979, briefly sets forth the reasons and some supporting authority. In addition to those relied upon by the district court as compelling dismissal, we note the following more recent authority in this circuit dictating dismissal on this record.

In House v. Mine Safety Appliance Co., 573 F.2d 609, 613-614 (9th Cir. 1978), we stated that the administrative claim requirement is jurisdictional. It cannot be waived. In House, we held 28 CFR § 14.2 to be properly within the power of the agency to adopt. We see no reason on this record to adopt a different conclusion with regard to 28 CFR § 14.4(b). See also, Avril v. United States, 461 F.2d 1090 (9th Cir. 1972), and Caidin v. United States, 564 F.2d 284 (9th Cir. 1977).

More recently, we have reaffirmed the principle that we are not at liberty "to extend the waiver [of the statute of limitations] beyond that which Congress intended." Bailey v. United States, 642 F.2d 344, 346 (9th Cir. 1981) (quoting United States v. Kubrick, 444 U.S. 111, 117-118, 100 S.Ct. 352, 357-58, 62 L.Ed.2d 259 (1979)). We believe the principles discussed in Bailey apply here.

We have considered the recent decision of the Fifth Circuit in Adams v. United States, 615 F.2d 284, reh. denied, 622 F.2d 197 (1980). We are, of course, bound by our prior precedents.

Under the regulations, the Navy was justified in requesting additional documentation. Swift v. United States, 614 F.2d 812 (1st Cir. 1980). The failure of Bright's attorney to respond rendered the claim inadequate and deprived the district court of jurisdiction.

AFFIRMED.

APPENDIX B

JS-6

FILED

JUL 24 1979

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED

JUL 26 1979

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID MICHAEL BRIGHT,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

No. CV 78-3110-RF(Zx)

JUDGMENT OF DISMISSAL

The motion of the defendant United States of America to dismiss or in the alternative for summary judgment came on for hearing on April 2, 1979. Both parcies appeared through their respective attorneys of record. The court has considered the argument of counsel and the pleadings, memoranda, and all matters filed. The court has issued its memorandum opinion.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above matter is ordered dismissed as to defendant United States of America and that said defendant be awarded its costs of suit.

DATED: July 24, 1979.

Robert Firth

ROBERT FIRTH
UNITED STATES DISTRICT JUDGE

AUG 8 1979

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Duplicate Page
Reference Page

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APPENDIX C

FILED
JUL 24 1979
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
RF DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID MICHAEL BRIGHT,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

No. CV 78-3110-RF(Kx)

MEMORANDUM OPINION

The motion of defendant United States of America for dismissal or in the alternative for summary judgment came on for rehearing on April 2, 1979, after the court requested filing of additional information which had been submitted to defendant in support of the claim of plaintiff David Michael Bright. By earlier order, filed January 31, 1979, defendants United States Navy, Port Hueneme Naval Hospital, and Lt. Comdr. Lovett, M.D., had been dismissed, as had the entire claim of plaintiff Patricia Bright. These dismissals had been unopposed by plaintiffs' counsel for reasons set forth in the earlier briefs of the parties.

Plaintiff claims to have suffered a severe and permanent injury as a result of the negligence on or about December 9, 1975,

17

of Lt. Comdr. Lovett, M.D., who was at that time allegedly acting in the course and scope of his employment of defendant United States of America. Jurisdiction of this court is claimed under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 et seq.

In March of 1977, plaintiff, through his attorney, filed an administrative claim, which was rejected in that same month as incomplete, and further information was requested to substantiate the claim, as required by existing regulations. Further information was supplied, and additional correspondence took place over the next several months, and the battle line was drawn. The defendant took the position that plaintiff's supporting information was incomplete and unacceptable. On November 23, 1977, plaintiff's attorney took issue with this, and informed defendant that if further word were not received within 15 days, the plaintiff would assume the claim was denied and would commence litigation. There was a response to this letter on April 11, 1978. Plaintiff's complaint was filed on August 11, 1978.

This court has reviewed the pleadings, the briefs, the exhibits, and all matters that have been submitted. There is apparently no dispute as to what information was supplied to the defendant in support of plaintiff's claim.

The issue is simple: Did the claim and supporting material meet the statutory and regulatory requirements?

This court must answer this in the negative. 28 U.S.C. § 2675, 28 C.F.R. 14.1 et seq., and 32 C.F.R. 750.1 et seq. have not been complied with. This court lacks jurisdiction. Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Rothman v. United States, 434 F.Supp. 13 (C.D. Cal. 1977); State Farm v. United

(193)

States, 446 F.Supp. 191 (C.D. Cal. 1978).

While there appears to be some question as to whether the matter should be treated as one for disposition on a motion to dismiss or on a motion for summary judgment, it is apparent that there is no issue of fact.

A motion to dismiss appears to be the appropriate remedy. Caton v. United States, supra. Accordingly, the matter is ordered dismissed for a lack of jurisdiction.

DATED: July 24, 1979.

ROBERT FIRTH
UNITED STATES DISTRICT JUDGE

(294)

APPENDIX D

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 C.F.R. § 14.2 Administrative claim; when presented.

(a) For purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from

a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. If a claim is presented to the wrong Federal agency, that agency shall transfer it forthwith to the appropriate agency.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

28 C.F.R. § 14.4 Administrative claims; evidence and information to be submitted.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that

he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on January 13, 1982, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Clerk, U.S. District Court
for the Hon. Robert Firth,
U.S. District Judge
312 North Spring Street
Los Angeles, California 90012

Stephen Trott,
U.S.Attorney
Stephen P. O'Neill,
Assistant U.S. Attorney
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012

Clerk, U.S. Court of Appeals
P.O. Box 547
San Francisco, California 94104

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 13, 1982 at Santa Monica, California.

Kirk W. Harney
(Original signed)

Appendix

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

81-1365

No. _____

In the Supreme Court of the United States

October Term, 1981

DAVID MICHAEL BRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. _____

In the Supreme Court of the United States

October Term, 1981

DAVID MICHAEL BRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID MICHAEL BRIGHT,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 79-3521
D.C. No. CV 78-3110-RF(KX)
MEMORANDUM

FILED
OCT 15 1981
CLERK, U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Central District of California
The Honorable Robert Firth, Presiding
Argued and submitted April 6, 1981

Before: ANDERSON and NELSON, Circuit Judges, and MURPHY,* District Judge.

Appellant (Bright) in this Federal Tort Claims Act case alleged the failure of a Navy doctor to diagnose and treat decompression symptoms after a deep sea dive. His complaint was dismissed for lack of jurisdiction based on the Navy's position that Bright, through his attorney, had filed an insufficient claim.

We do not set forth the sequence of events. The pertinent events are well reflected in the record and are known to the parties. It is sufficient to say that Bright's attorney does not, and on this record could not, claim ignorance of the specific requirements of the regulations and the specific notices and requests of the Navy. Counsel for Bright adopted an obstinant attitude in the face of the reasonable requests.

*The Honorable Thomas F. Murphy, Senior United States District Judge, Southern District of New York, sitting by designation.

The district court held that the failure to provide medical, employment, expense, and witness information in suport of his claim as provided in the regulations adopted pursuant to the Federal Tort Claims Act barred Bright's action in the district court. We agree and affirm.

The district court's Memorandum of opinion filed July 24, 1979, briefly sets forth the reasons and some supporting authority. In addition to those relied upon by the district court as compelling dismissal, we note the following more recent authority in this circuit dictating dismissal on this record.

In *House v. Mine Safety Appliance Co.*, 573 F.2d 609, 613-614 (9th Cir. 1978), we stated that the administrative claim requirement is jurisdictional. It cannot be waived. In *House*, we held 28 CFR § 14.2 to be properly within the power of the agency to adopt. We see no reason on this record to adopt a different conclusion with regard to 28 CFR § 14.4(b). *See also, Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972), and *Caidin v. United States*, 564 F. 2d 284 (9th Cir. 1977).

More recently, we have reaffirmed the principle that we are not at liberty "to extend the waiver [of the statute of limitations] beyond that which Congress intended." *Bailey v. United States*, 642 F. 2d 344, 346 (9th Cir. 1981) (*quoting United States v. Kubrick*, 444 U.S. 111, 117-118, 100 S.Ct. 352, 357-58, 62 L.Ed.2d 259 (1979)). We believe the principles discussed in *Bailey* apply here.

We have considered the recent decision of the Fifth Circuit in *Adams v. United States*, 615, F.2d 284, *reh. denied*, 622 F.2d 197 (1980). We are, of course, bound by our prior precedents.

Under the regulations, the Navy was justified in requesting additional documentation. *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980). The failure of Bright's attorney to respond rendered the claim inadequate and deprived the district court of jurisdiction.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JS-6

FILED

JUL 24 1979

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED

JUL 26 1979

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

DAVID MICHAEL BRIGHT,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV 78-3110-RF(Kx)

JUDGMENT OF DISMISSAL

The motion of the defendant United States of America to dismiss or in the alternative for summary judgment came on for hearing on April 2, 1979. both parties appeared through their respective attorneys of record. The court has considered the argument of counsel and the pleadings, memoranda, and all matters filed. The court has issued its memorandum opinion.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above matter is ordered dismissed as to defendant United States of America and that said defendant be awarded its costs of suit.

DATED: July 24, 1979.

Robert Firth

ROBERT FIRTH
UNITED STATES DISTRICT JUDGE

AUG 8 1979 000020

APPENDIX C

FILED
JUL 24 1979
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY RF DEPUTY

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID MICHAEL BRIGHT,

Plaintiff,

No. CV 78-3110-RF(Kx)

v.

MEMORANDUM OPINION

UNITED STATES OF AMERICA,

Defendant.

The motion of defendant United States of America for dismissal or in the alternative for summary judgment came on for rehearing on April 2, 1979, after the court requested filing of additional information which had been submitted to defendant in support of the claim of plaintiff David Michael Bright. By earlier order, filed January 31, 1979, defendants United States Navy, Port Hueneme Naval Hospital, and Lt. Comdr. Lovett, M.D., had been dismissed, as had the entire claim of plaintiff Patricia Bright. These dismissals had been unopposed by plaintiffs' counsel for reasons set forth in the earlier briefs of the parties.

Plaintiff claims to have suffered a severe and permanent injury as a result of the negligence on or about December 9, 1975, of Lt. Comdr. Lovette, M.D., who was at that time allegedly acting in the course and scope of his employment o defendant United States of America. Jurisdiction of this court is claimed under the Federal Torts Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.*

In March of 1977, plaintiff, through his attorney, filed an administrative claim, which was rejected in that same month as incomplete, and further information was requested to substantiate the claim, as required by existing regulations. Further information was supplied, and additional correspondence took place over the next several months, and the battle line was drawn. The defendant took the position that plaintiff's supporting information was imcomplete and unacceptable. On November 23, 1977, plaintiff's attorney took issue with this, and informed defendant that if further word were not received within 15 days, the plaintiff would assume the claim was denied and would commence litigation. There was a response to this letter on April 11, 1978. Plaintiff's complaint was filed on August 11, 1978.

This court has reviewed the pleadings, the briefs, the exhibits, and all matters that have been submitted. There is apparently no dispute as to what information was supplied to the defendant in support of plaintiff's claim.

The issue is simple: Did the claim and supporting material meet the statutory and regulatory requirements?

This court must answer this in the negative. 28 U.S.C. § 2675, 28 C.F.R. 14.1 *et seq.*, and 32 C.F.R. 750.1 *et seq.* have not been complied with. This court lacks jurisdiction. *Caton v. United States,* 495 F.2d 635 (9th Cir. 1974); *Rothman v. United States,* 434 F. Supp. 13 (C.D. Cal. 1977); *State Farm v. United States,* 446 F.Supp, 191 (C.D. Cal. 1978).

While there appears to be some question as to whether the matter should be treated as one for disposition on a motion to dismiss or on a motion for summary judgment, it is apparent that there is no issue of fact.

A motion to dismiss appears to be the appropriate remedy. *Caton v. United States, supra.* Accordingly, the matter is ordered dismissed for a lack of jurisdiction.

DATED: July 24, 1979.

ROBERT FIRTH
UNITED STATES DISTRICT JUDGE

(294)

APPENDIX D

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 C.F.R. § 14.2 Administrative claim; when presented.

(a) For purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from

a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. If a claim is presented to the wrong Federal agency, that agency shall transfer it forthwith to the appropriate agency.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

28 C.F.R. § 14.4 Administrative claims; evidence and information to be submitted.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that

he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

Opposition

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1365

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID MICHAEL BRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
MICHAEL F. HERTZ
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a district court has jurisdiction over an action brought under the Federal Tort Claims Act notwithstanding the claimant's refusal to supply documentation in support of the claim that was requested by the defendant agency.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1365

DAVID MICHAEL BRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-22) and the opinion of the district court (Pet. App. 24-26) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1981. The petition for a writ of certiorari was filed on January 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner brought this action against the United States under the Federal Tort Claims Act (FTCA),

28 U.S.C. 1346(b), 2671 *et seq.*, for alleged negligence on the part of medical personnel at the Navy Hospital in Port Hueneme, California (R. 1-6).[1] The district court held that it lacked jurisdiction over the action because petitioner had failed to file an adequate administrative claim (Pet. App. 24-26), and the court of appeals affirmed in an unpublished memorandum opinion (*id.* at 21-22).

1. As a result of a scuba diving accident on December 9, 1975, petitioner allegedly experienced decompression sickness, commonly referred to as the "bends" (Pet. 5; Pet. App. 21, 24). Although a civilian, petitioner presented himself at the emergency room of the Port Hueneme Navy Hospital on the day of the accident, where he was examined by the emergency room physician, Lieutenant Commander William L. Lovett (R. 34, 78). This brief emergency room examination was the only medical care or treatment given petitioner by any medical personnel employed by the United States.

On March 3, 1977, petitioner submitted an incomplete administrative claim form to the Naval Support Activity, Long Beach, California (Standard Form (SF) 95).[2] The incomplete form was returned

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[1] "R." refers to the Excerpt of Record filed in the court of appeals.

[2] SF 95 itself, on its reverse side, requires (R. 35) a personal injury claimant to submit:

> a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical [or] hospital * * * expenses actually incurred.

No such documentation accompanied petitioner's SF 95.

to petitioner's attorney by letter dated March 15, 1977, explaining that the claim could not be processed for two reasons: (1) petitioner had failed to comply with Privacy Act requirements; and (2) petitioner had failed to substantiate the amount of his personal injury claim. The Navy's letter enclosed a copy of the regulations specifying the contents of a valid administrative claim (R. 25).

On August 30, 1977, petitioner submitted a second purported administrative claim (R. 26-27). Although petitioner had cured the Privacy Act defect and had submitted copies of some medical records (R. 84-221), his resubmitted claim was still deficient. It failed to state the total amount claimed in the appropriate section of the claim form and, more important, it again failed to furnish adequate supporting documentation for petitioner's personal injury claim (R. 27). The chief of the Claim Section of the Navy's San Diego Legal Service Office, Lieutenant Commander R. A. Smith, brought these deficiencies to petitioner's counsel's attention in a letter dated October 27, 1977 (R. 28-29). The letter also requested, *inter alia*, a detailed written report by petitioner's attending civilian physician, itemized receipts of medical expenses, including the physician's estimate of future expenses, insurance information, employment records, and statements of witnesses (R. 28). The letter explained that the requested materials were "required by the Attorney General's Regulations (28 C.F.R. 14) and Navy General Claims Regulations (32 C.F.R. 750)" (R. 29).

On November 23, 1977, petitioner's counsel resubmitted the claim form with the total amount claimed ($5,000,000) inserted in the appropriate section of the form (R. 34-35) and otherwise responded to

Lieutenant Commander Smith's letter as follows (R. 30-31):

> Quite frankly, it seems pointless to me to start preparing and forwarding to you extensive hospital and medical reports and the other information you are requesting at this time. In light of the demand we are making, and the injuries received, you will obviously at some future time be denying this claim and requesting the same information once the discovery of [*sic*] process has been commenced after a lawsuit has been initiated.
>
> In addition, any statement I wish to make regarding the legal basis of this claim and the justification for the amount demanded will of course be made once the lawsuit has been filed and we have begun the discovery process.
>
> In light of the foregoing, and as the attorneys for the government will most assuredly want to take the deposition of Mr. Bright and have him examined by their own personnel, I strongly suggest that the Department of the Navy take the position that the claim should be denied at the present time. Thereafter, Mr. Bright can file a lawsuit in federal court and we can get on with the business of determining liability and damages.

By letter of April 11, 1978, the Navy informed petitioner's attorney that because the resubmitted claim had never been perfected in accordance with applicable regulations it could not be administratively adjudicated (R. 32-33).

2. Petitioner then filed this action in the United States District Court for the Central District of California (R. 1-6). The United States moved to dismiss or, in the alternative, for summary judgment on the ground that the district court lacked subject

matter jurisdiction because petitioner had not filed a proper administrative claim (R. 7-36). The district court granted the motion to dismiss, stating (Pet. App. 25) that petitioner's "claim and supporting material [did not] meet the statutory and regulatory requirements."

The court of appeals affirmed, noting (Pet. App. 21) that "[c]ounsel for [petitioner] adopted an obstinate attitude in the face of the reasonable requests." Emphasizing that "[t]he administrative claim requirement is jurisdictional [and] cannot be waived" (*id.* at 22), the court concluded that "[u]nder the regulations, the Navy was justified in requesting additional documentation" (*ibid.*) and that, therefore, "the failure to provide medical, employment, expense, and witness information in support of his claim as provided in the regulations adopted pursuant to the Federal Tort Claims Act barred [petitioner's] action in the district court" (*id.* at 21-22).

ARGUMENT

1. Petitioner does not dispute that he wilfully "declined to provide additional documentation" as part of the administrative claim settlement process, preferring "to have his claim denied so he could file suit in the District Court * * *" (Pet. 2).[3] Rather,

[3] As the court of appeals noted (Pet. App. 21), petitioner's "attorney does not, and on this record could not, claim ignorance of the specific requirements of the regulations and the specific notices and requests of the Navy." Petitioner's assertion (Pet. 6) that Navy personnel advised his counsel on April 25, 1977 (R. 38-39) that the medical records then in petitioner's possession would be sufficient for evaluation of petitioner's administrative claim ignores the government's subsequent requests for additional documentation (see page 3, *supra*).

petitioner asserts that he was not required to cooperate in any efforts by the agency to reach an administrative resolution of his claim. In support of this contention, petitioner relies (Pet. 13-20) on the Fifth Circuit's decision in *Adams* v. *United States*, 615 F.2d 284, as clarified, 622 F.2d 197 (1980), which he suggests is in irreconcilable conflict with the decision below.

To be sure, the Fifth Circuit in *Adams* stated (615 F.2d 289) that a district court has jurisdiction over an FTCA claim once a claimant "(1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim." The facts in *Adams*, however, were wholly distinguishable from those of the present case. In *Adams*, "the Air Force already possessed, or had ready access to, most of the information demanded, such as pertinent medical records and itemized bills or expenses" (615 F.2d at 287) by virtue of the fact that the victim of the alleged malpractice in that case, Jason Adams, had been either under the care of Air Force physicians in an Air Force hospital or undergoing treatment at the Sacred Heart Hospital, under arrangements made by the Air Force (615 F.2d at 285). As the Fifth Circuit noted (*id.* at 287):

> All relevant medical records were prepared either by the Air Force's own physicians or by the physicians at Sacred Heart Hospital, where the Air Force's doctors arranged for various tests to be run on Jason Adams. Likewise, the Air Force, which covered all expenses for the child's care, had access to itemized bills and expenses. The record does not indicate that the Adams' past medical expenses included any expense not covered by these bills.

By contrast, the only contact the United States had with petitioner was his brief visit to the Port Hueneme Navy Hospital emergency room on the date of his accident. The Navy thus lacked the extensive opportunity that the Air Force had in *Adams* to become familiar with the actual injuries and expenses on which the administrative claim was based. In view of these widely divergent factual circumstances, there is substantial reason to doubt petitioner's unequivocal assertions (Pet. 12, 15-16) that the result in this case would have been different if it had arisen in the Fifth Circuit.

Moreover, in denying the government's petition for rehearing in *Adams*, the Fifth Circuit made clear that its decision in that case was based largely on its particular facts, and suggested that it might not extend beyond them (622 F.2d 197 (1980)):

> The present appeal does not present a case in which the notice of claim presented by the claimant in an executed standard form 95 was inadequate in content or detail. * * * We deal instead with another problem. We hold that the agency lacks the power to require that the claimant supplement a notice of claim, that contained "enough details [about the underlying incident from which the complaint arose] to enable the agency to begin its own investigation." [615 F.2d] at 292. * * * We have not, however, intimated an opinion as to the effect, if any, a claimant's refusal to comply with an agency's reasonable request for supplemental information to clarify an inadequate claim would have on the issue of jurisdiction in a subsequent action for damages brought pursuant to the Federal Tort Claims Act.

The situation here was quite different. As noted above (note 2, *supra*), the submission in this case was not even accompanied by the documentation required by the text of SF 95 itself.[4]

The Fifth Circuit in *Adams* did not question that an agency must be furnished enough information to enable it to make an intelligent assessment of a claimant's damages. Here, however, unlike in *Adams*, the Navy neither was supplied with nor possessed within its own records sufficient information to enable it to ascertain the extent of the harm allegedly suffered by petitioner. Although petitioner furnished medical records concerning the period immediately following his accident, he did not furnish, *inter alia*, a current medical report, a statement of lost earnings, or a projection of future diminished earning capacity. Petitioner simply made a conclusory assertion of damages in the amount of $5,000,000 and adopted an

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[4] In an alternative holding in *Douglas* v. *United States*, 658 F.2d 445, 447-448 (1981), the Sixth Circuit expressed its approval of the Fifth Circuit's decision in *Adams*. The *Douglas* court emphasized (*id.* at 448-449), however, that an agency must be given sufficient information to enable it to arrive at a reasonable settlement figure.

The claimant in *Douglas* sought damages totaling only $15,000. In support of that claim, he provided both medical reports and a form from his employer stating the amount of his lost earnings (658 F.2d at 448-449). The court in *Douglas* distinguished cases in which "damage was so conclusorily asserted that investigation was difficult if not impossible," observing that such conclusory damage assertions make it "truly impossible for the government agents to place a meaningful settlement value on the asserted claims" (*id.* at 448). The court also noted (*id.* at 449) "a distinction between not settling a claim and attempting to bypass settlement procedures." On the facts of the case before it, the *Douglas* court concluded (*ibid.*), "[i]t cannot be said * * * that [the claimant] has attempted to evade the FTCA's requirements."

obstinate attitude when the Navy sought additional information (Pet. App. 21). Compare *Douglas* v. *United States*, 658 F.2d 445, 449 (6th Cir. 1981) (claimant sought only $15,000 and did not attempt to bypass administrative procedures mandated by the Act).

In any event, even if the decision below were viewed as inconsistent with *Adams*, review by this Court would not be warranted. The court of appeals' decision in this case is unpublished and has no precedential force. See Rule 21(c), Rules of the United States Court of Appeals for the Ninth Circuit. Petitioner concedes (Pet. 17) that prior Ninth Circuit precedents "did not establish a rule squarely in conflict with the Fifth Circuit's rule."

2. Petitioner asserts that the courts below erred in holding that a claimant must comply with reasonable agency requests for information prior to bringing suit under the FTCA. To the contrary, the decision below is a wholly reasonable construction of the administrative claim requirement of 28 U.S.C. 2675(a) which, moreover, is necessary for the full effectuation of the policies underlying that requirement.

Section 2675(a) clearly provides that "[a]n action shall not be instituted against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency * * *." Nowhere in the statute, however, is the phrase "present[ation of] the claim" defined.[5]

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[5] While petitioner concedes (Pet. 11-12) the applicability of 28 C.F.R. 14.2 to this case, he contends (Pet. 12-20) that

Accordingly, it is appropriate to resort to the legislative history of the provision.

Congress enacted the administrative claim requirement in 1966 "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966). As the First Circuit stated in *Swift* v. *United States*, 614 F.2d 812 (1980), " '[t]he purpose of requiring preliminary administrative presentation of a claim is to permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of FTCA suits . . . .' " *Id.* at 814, quoting *Kornbluth* v. *Savannah*, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975).[6]

Section 14.4, which permits an agency to make the type of request for documentation that the Navy made here, is inapposite. Section 14.2, like Section 14.4, however, was promulgated under the authority of 28 U.S.C. 2672 (see 28 C.F.R. Part 14 ("authority")), the administrative settlement provision. Indeed, Section 14.2, unlike Section 14.4, specifically refers to 28 U.S.C. 2672. Accordingly, 28 C.F.R. 14.4 bears as much relevance to the present case as does 28 C.F.R. 14.2, on which petitioner expressly relies (Pet. 11-12).

Moreover, contrary to petitioner's unsupported assertion (Pet. 12), there is indeed "dispute in the present case [whether] petitioner's Standard Form 95, as modified at the Navy's request, met the * * * requirements of [28 C.F.R. 14.2]." As noted above (note 2, *supra*), SF 95 itself requires supporting documentation that petitioner knowingly failed to provide.

[6] Although not precisely on point, the First Circuit's holding in *Swift*, that a claimant's failure to document an administrative claim as requested by the agency, which results in the agency's failure to act on the claim within six months of

If an agency is to conduct a meaningful evaluation of a claim, it must be able to require a claimant to provide information beyond bare notice of an incident and a request for damages in a certain amount. Any rule to the contrary would transform the administrative claim process into an empty ritual, and could not be reconciled with Congress' goals of easing court congestion and avoiding unnecessary litigation.[7]

Finally, contrary to petitioner's implication (Pet. 13), the rule applied by the courts below does not prejudice the claimant by "allow[ing] the government to obtain full discovery from a claimant at a time when the claimant has no legal means by which he may obtain any sort of discovery from the government." It is true that no reciprocal exchange of information is mandated as part of the administrative process. Nevertheless, the claimant is under no obligation to reach a pretrial settlement with the government and, if he does not, he will be entitled to full discovery against the government once he has filed his FTCA action in district court.

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its receipt, precludes district court jurisdiction over the claim based on the running of the six-month period, fully supports the decision below by making clear that the agency is entitled to require the claimant to furnish documentation in support of the administrative claim.

[7] Statistics concerning FTCA claims compiled by the Torts Branch of the Civil Division, U.S. Department of Justice, reveal the magnitude of the burden that relaxation of the administrative claim requirement would impose on the courts. For example, in 1981 the United States Postal Service alone received 9,567 administrative claims and settled 7,891 claims for a total of $7.6 million.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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